



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket DOT-OST-2022-0037]

Department of Transportation Drug and Alcohol Testing Data

AGENCY: Office of the Secretary, Transportation (DOT).

ACTION: Request for Information.

SUMMARY: In March 2021, the Government Accountability Office (GAO) published a report titled “DOT Has Taken Steps to Verify and Publicize Drug and Alcohol Testing Data but Should Do More.” The report examines how the Department of Transportation (DOT) uses drug and alcohol testing data, how DOT verifies that data are reliable, and whether DOT follows key actions for transparently reporting drug and alcohol testing data. The drug and alcohol testing data are primarily used by the DOT modal administrations and the United States Coast Guard (USCG) to determine the random testing rate(s) for safety-sensitive employees in each industry each year. In response to a recommendation from the GAO Report, DOT requests information from potential users in the public to determine if there is a broader audience for the public data, consistent with key actions for open government data.

DATES: Comments on this notice must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Docket Number DOT-OST-2022-0037 using any of the following methods:

- Federal eRulemaking Portal: Go to <https://www.regulations.gov/docket/DOT-OST-2022-0037/document>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

- Hand Delivery or Courier: West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251.

To avoid duplication, please use only one of these methods. See the “Public Participation and Request for Comments” portion of the SUPPLEMENTARY INFORMATION section for instructions on submitting comments, including collection of information comments for the Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Mike Huntley, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE, Washington, DC 20590; telephone number 202-366-3784; ODAPCwebmail@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

BACKGROUND

DOT Drug and Alcohol Testing Program Overview

Safety is the top priority of DOT. A cornerstone of our safety policy is ensuring that transportation providers across all modes – on roads, rails, water, or in the air, over land and underground – employ operators who do not use illicit drugs or misuse alcohol. The Department works towards deterring the use of illicit drugs and the misuse of alcohol in the transportation industries, and creating prevention and treatment opportunities for transportation employers and employees.

Since 1988, DOT has regulated the process by which employers in the different transportation industries (aviation, trucking, rail, transit, pipeline, and maritime) must test their employees for drug and alcohol use. Nearly 6 million people performing safety sensitive transportation jobs are covered by the DOT drug and alcohol regulations, including pilots and flight attendants, truck drivers, subway operators, ship captains, pipeline controllers, aircraft

mechanics, locomotive engineers, bus drivers, and others. The DOT regulations govern the drug and alcohol testing process for pre-employment, random, post-accident, reasonable suspicion/cause, and required testing after an employee returns to work after failing or refusing a test. More than 6 million drug and alcohol tests are conducted each year under the DOT program.

History of DOT Drug and Alcohol Testing Program

DOT first published its drug testing procedures regulation, 49 CFR part 40 (“part 40”), on November 21, 1988 (53 FR 47002) as an interim final rule. The rule was based on the Department of Health and Human Services (HHS) guidelines for Federal agency employee drug testing (53 FR 11790; April 11, 1988), with some changes to fit the transportation workplace. DOT published a final rule responding to comments on the interim rule a year later (54 FR 49854; December 1, 1989), that included, among other things, a provision for a 5-panel drug test for cocaine, marijuana, phencyclidine, amphetamines, and opiates.

Under the Omnibus Transportation Employee Testing Act (OTETA) of 1991, codified at 49 U.S.C. 45102 and 45104 (aviation industry testing), 49 U.S.C. 20140 (rail), 49 U.S.C. 31306 (motor carrier), and 49 U.S.C. 5331 (transit), DOT was required to implement alcohol testing programs in various transportation industries.¹ In response to OTETA, DOT added alcohol testing procedures to part 40 in a final rule published on February 15, 1994 (59 FR 7340).

While there have been periodic updates to part 40 over the years, the DOT drug and alcohol testing requirements have remained fundamentally the same since the time that they were first established as noted above.

Part 40 is a DOT-wide regulation that prescribes how drug and alcohol testing is conducted, who is authorized to participate in the drug and alcohol testing program, and what employees must do before they may return to duty following a drug and/or alcohol violation. In

¹ OTETA also directed other changes to DOT’s substance abuse-related programs for most transportation industries that the Department regulates. With respect to drug testing procedures, the Act added a requirement for using the “split sample” approach to testing which Congress believed would provide an additional safeguard for employees.

addition, the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), the Pipeline and Hazardous Materials Administration (PHMSA), and the USCG have each established specific regulations that spell out their prohibitions on drug use and alcohol misuse, who is subject to the regulations, what testing is authorized, when testing is authorized, and the consequences for violating the drug and alcohol testing regulations. The DOT modal administrations and the USCG incorporate part 40 into their regulations and enforce compliance of their respective regulations.

At the present time, only urine specimens are authorized for use in DOT drug testing.² These urine specimens are collected by a qualified collector and sent to a laboratory certified by the HHS National Laboratory Certification Program for screening and confirmation. DOT requires testing for (1) marijuana, (2) cocaine, (3) opioids (codeine, morphine, heroin, hydrocodone, hydromorphone, oxycodone, oxymorphone), (4) phencyclidine (PCP), and (5) amphetamines, methamphetamines, and methylenedioxymethamphetamine (MDMA). Alcohol testing involves analyzing breath or saliva specimens for initial (screening) tests, and breath specimens for confirmation tests. The breath/saliva specimen is collected by a qualified Breath Alcohol Technician or Screening Test Technician (as appropriate) and analyzed by an alcohol testing device approved by the National Highway Traffic Safety Administration.

Drug and Alcohol Testing Management Information System (MIS) Data

Employers subject to DOT or USCG drug and alcohol testing regulations must submit annual drug and alcohol testing data as required by their respective DOT modal administration or the USCG (see 49 CFR 40.26). When submitting drug and alcohol testing data, employers are required to use the standardized, one-page “Drug and Alcohol Testing MIS Data Collection Form” (MIS Form) provided in Appendix H to part 40.³ FAA, FMCSA, FRA, FTA, and USCG

² DOT published a notice of proposed rulemaking on February 28, 2022 [87 FR 11156] that proposes to add oral fluid specimens to part 40 for use in the DOT drug testing program.

³ A copy of the MIS Form has been placed in the docket for this notice.

now permit (and prefer) employers to submit the required drug and alcohol testing data electronically, while PHMSA requires the required data be submitted electronically.

An employer collects and compiles drug and alcohol testing data generated throughout the year by their company's drug and alcohol testing program, and submits that data in its annual filing of the MIS Form. Specifically, for each employee category, an employer is required to provide (1) drug testing data (number of verified negative tests, verified positive tests (for each drug), refusal to test results (adulterated, substituted, shy bladder, others), and cancelled results), and (2) alcohol testing data (number of screening tests above and below 0.02, number of confirmation tests above and below 0.04, refusal to test results (shy lung, others) and cancelled results) for each type of test conducted (e.g., pre-employment, random, post-accident, reasonable suspicion/cause, return-to-duty, or follow-up).

The employer must complete the MIS Form and certify that the information is accurate. The annual drug and alcohol testing data submitted for a specific calendar year is to be submitted by March 15th of the following calendar year. The completed MIS Form contains only aggregate data, and does not contain any employee-specific information.

How the MIS Data Is Used

The DOT modal administrations and the USCG use the drug and alcohol MIS testing data primarily to determine the random testing rate(s) for safety-sensitive employees in each industry for subsequent years.⁴ Specifically, each DOT modal administration and the USCG uses the random drug testing positive/refusal rate and the random alcohol testing violation rate, as applicable and respectively, from the prior year to determine the random testing rate in the following calendar year.

All five of the modal administrations and USCG require their regulated employers to conduct random drug tests. Their respective regulations provide that the minimum annual

⁴ In addition to using drug and alcohol testing data to calculate the annual random testing rate, DOT has periodically used that data to target educational outreach to the industry.

percentage rate for random drug testing for the industry will be either 25 or 50 percent, depending on the industry-wide random drug testing positive/refusal rate reported for the previous calendar year or years. For example, if the random drug testing positive/refusal rate is at or above 1 percent, then the modal administration or USCG will increase the minimum annual percentage rate for random drug testing for the following year to 50 percent or make no adjustment if it is already at 50 percent. If the minimum annual percentage rate for random drug testing is at 50 percent and the positive/refusal rate is less than 1 percent for 2 consecutive years, then the DOT modal administration or USCG has the discretion to lower the minimum annual percentage rate for random drug testing to 25 percent for the following year. For 2022, the minimum annual percentage rate for random drug testing is set at 50 percent for three DOT modal administrations (FMCSA, FTA, and PHMSA) and the USCG, and at 25 percent for FAA and FRA (both for FRA maintenance-of-way (MOW) employees and FRA covered service employees).⁵

Four of the five DOT modal administrations require random alcohol testing (FRA, FAA, FMCSA, and FTA).⁶ Their respective regulations provide that the minimum annual percentage rate for random alcohol testing for the industry will be 10, 25, or 50 percent. These DOT modal administrations adjust this alcohol testing rate for safety-sensitive employees based on their respective industry-wide random alcohol testing violation rate reported for the previous calendar year or years. For example, regardless of whether the random testing rate is 50, 25, or 10 percent, if the violation rate is 1 percent or more for a year, then the modal administration will increase the alcohol testing rate for the next year to 50 percent, or make no adjustment if it is already at 50 percent. The 2022 random alcohol testing rate is 10 percent for all four modal administrations.⁷

⁵ See <https://www.transportation.gov/odapc/random-testing-rates>.

⁶ PHMSA and the USCG do not require random alcohol testing.

⁷ See <https://www.transportation.gov/odapc/random-testing-rates>.

The DOT modal administrations and the USCG publish annual notices in the Federal Register that outline the prior years' positive/refusal rates or alcohol violation rates, as relevant, and state the minimum annual percentage rate(s) for random testing for the next calendar year.⁸ The minimum annual percentage rate for random testing is the specified minimum percentage of safety-sensitive employees that employers must randomly select and test throughout the calendar year. Employers may select and test at a higher rate but must select and test at the minimum mandatory rate to comply with the respective modal regulations.

SUPPORT FOR PATIENTS AND COMMUNITIES ACT

Federal Bill H. R. 6., the "Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act" (the "SUPPORT Act") was signed into law on October 24, 2018.

Drug and Alcohol Testing MIS Database

Section 8103 of the SUPPORT Act, titled "Department of Transportation Public Drug and Alcohol Testing Database" required DOT to, not later than March 31, 2019, establish and make publicly available on its website a database of the drug and alcohol testing data reported by employers for each mode of transportation, and update the database annually. Specifically, for each mode of transportation, the database must include (1) the total number of drug and alcohol tests by type of substance tested; (2) the drug and alcohol test results by type of substance tested; (3) the reason for the drug or alcohol test, such as preemployment, random, post-accident, reasonable suspicion or cause, return-to-duty, or follow-up, by type of substance tested; and (4) the number of individuals who refused testing.

In response to the above, DOT published aggregated data from its internal database on its website in March 2019 for each mode (i.e., FRA, FAA, FMCSA, FTA, and PHMSA) and the USCG by substances tested (drugs or alcohol), by reason for testing, and by year (2003 through 2018). The database has since been updated annually to include the most recent available data

⁸ FMCSA only publishes a Federal Register notice if its testing rate changes.

for 2019 and 2020. The database may be accessed at https://www.transportation.gov/odapc/DOT_Agency_MIS_Data. The database does not contain any personally identifiable information.

GAO Report on DOT's Collection and Use of Drug and Alcohol Testing Data

Section 8104 of the SUPPORT Act, titled “GAO Report on Department of Transportation’s Collection and Use of Drug and Alcohol Testing Data,” required GAO, not later than 2 years after the date the DOT public drug and alcohol testing database was established under Section 8103 of the Act, to (1) review the DOT drug and alcohol testing MIS, and (2) submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the review. The GAO Report was required to include (1) a description of the process DOT uses to collect and record drug and alcohol testing data submitted by employers for each mode of transportation, (2) an assessment of whether and if so, how DOT uses the data in carrying out its responsibilities, and (3) an assessment of the DOT public drug and alcohol testing database required under the Act. The Report was to include recommendations regarding how DOT can best use the drug and alcohol testing data, any improvements that could be made to the process by which the data is collected from employers, and whether and, if so, how the DOT drug and alcohol testing database could be made more effective.

Pursuant to the above, GAO conducted a performance audit on the DOT drug and alcohol testing data from October 2019 to March 2021. In conducting the audit, GAO reviewed relevant laws and regulations, among other things. To determine how DOT verifies that data are reliable, GAO reviewed documents, analyzed data in the DOT internal database from calendar years 2003 through 2018, and interviewed DOT officials. GAO also reviewed the DOT public website and compared it to key actions for open government data.

In March 2021, GAO published a report titled “DOT Has Taken Steps to Verify and Publicize Drug and Alcohol Testing Data but Should Do More.”⁹ The report examines (1) how DOT uses drug and alcohol testing data, (2) how DOT verifies that data are reliable, and (3) whether DOT follows key actions for transparently reporting drug and alcohol testing data.

GAO made three recommendations to DOT¹⁰ as follows:

- 1) “The Secretary of Transportation should direct the Administrators of FAA, FMCSA, FRA, FTA, and PHMSA to: (1) evaluate the different processes used by each modal administration to verify drug and alcohol testing data—including comparing data to records during inspections, checking data for errors manually or with software, and contacting employers that do not submit a report or submit an incomplete report—and (2) determine what, if any, additional steps should be taken to improve the reliability of the information. (Recommendation 1)”
- 2) “The Director of ODAPC should disclose known limitations of drug and alcohol testing data on DOT’s website, consistent with key actions for open government data. (Recommendation 3)”
- 3) “The Director of ODAPC should reach out to potential users in the public to determine if there is a broader audience for the public data, consistent with key actions for open government data, and if a broader audience is identified, engage with users to evaluate the benefits and costs of adopting additional key actions for open government data and any other possible improvements to the website. (Recommendation 4)”

Regarding Recommendation 3 and Recommendation 4, GAO found that DOT’s drug and alcohol testing website, which DOT published in March 2019 as required by the SUPPORT for Patients and Communities Act, follows eight of 16 key actions that GAO has previously

⁹ A copy of the GAO Report (Report GAO-21-296) has been placed in the Docket for this notice.

¹⁰ GAO’s Recommendation 2 applies to the USCG only, and not to DOT.

identified for transparently reporting government data. However, GAO found that DOT does not fully follow eight other key actions for transparently reporting data on the drug and alcohol testing website, including: (1) disclosing known data limitations (Recommendation 3) and (2) reaching out to potential users in the public to encourage data use (Recommendation 4). In addition, GAO stated that “DOT currently does not follow or partially follows six other key actions that may improve the website. However, the immediate benefits and costs of following these six actions are unclear because DOT has not reached out to users to determine if the value of making changes to the website outweigh the time and resources necessary to implement them.”

Specifically with respect to Recommendation 4, GAO found that while DOT’s Office of Drug and Alcohol Policy and Compliance (ODAPC) “does discuss the modal administrations’ drug and alcohol testing programs at industry conferences, it does not discuss the public drug and alcohol testing data.” In addition to being a key action identified by GAO, the OPEN Government Data Act¹¹ requires agencies to develop a plan to allow for collaboration with non-government entities, including businesses, researchers, and the public, for the purpose of understanding how data users value and use government data.

GAO stated that “potential users in the public may not be aware of the website or potential uses of the data. For example, if aware that the information is now publicly available, a motor carrier employer could use the public drug and alcohol testing data to understand how that individual employer’s drug and alcohol testing results compare to industry-wide results. However, because ODAPC has not identified or reached out to potential users in the public, officials cannot be certain the public is not interested in the data. As a result, DOT does not know whether the website meets the requirements for transparently providing data, or if additional improvements could make this a more valuable resource for users.”

DOT ACTIONS IN RESPONSE TO THE GAO REPORT

¹¹The Open, Public, Electronic and Necessary Government Data Act of 2018 (OPEN Government Data Act) is Title II of the Foundations for Evidence-Based Policymaking Act of 2018 (Evidence Act).

DOT concurred with each of the recommendations above.

Recommendations 1 and 3

In response to Recommendation 1, DOT has committed to take action to implement the steps recommended by GAO. Each operating administration plans to conduct a review of its drug and alcohol data collection process to identify additional process improvements, if any, that should be taken to improve the reliability of the information it collects. DOT expects to complete this action by June 30, 2022.

In response to Recommendation 3, ODAPC posted the known data limitations for FRA and FMCSA on the drug and alcohol testing website in February 2022, beginning with the 2020 data.

Recommendation 4

In response to Recommendation 4, ODAPC has discussed the availability of the public drug and alcohol testing data on the DOT website at numerous industry and government conferences and training sessions, including at meetings of (1) the American Association of Medical Review Officers, (2) the Drug and Alcohol Testing Industry Association, (3) the Substance Abuse Program Administrators Association, (4) HHS's Substance Abuse and Mental Health Services Administration's Drug Testing Advisory Board, and (5) the FTA's annual drug and alcohol conference.¹²

In addition, and consistent with the requirements of the OPEN Government Data Act, DOT is publishing this Request for Information to (1) increase awareness regarding the availability of the drug and alcohol testing data on the DOT website, and (2) collaborate with, and solicit input from, non-governmental entities such as stakeholders, researchers, and the public to better understand how those users may value and use the drug and alcohol testing data that is publicly available on the website.

¹² In addition to the actions taken by ODAPC, as required by GAO Recommendation 4, individual DOT modes have also discussed the availability of the public drug and alcohol testing data during presentations to industry groups.

Importantly, open government data only create value to the extent that they are used.

GAO – in a separate report¹³ – has identified three key actions for engaging with users:

- (1) *Identify data users and their needs.* By identifying who is using the data and what content or features are important to them, data providers can better prioritize their efforts to present information to data consumers. From this:
 - a. DOT requests information regarding what entities use the drug and alcohol testing data on the DOT website.
 - b. DOT requests information regarding how those entities use the drug and alcohol testing data on the DOT website.
- (2) *Solicit and be responsive to user feedback.* Soliciting and being responsive to user feedback – both when a website is being developed and on an ongoing basis – can help ensure that the website meets users’ needs. Feedback can also surface issues with the functionality of the website, thus enabling the data provider to make corrections when needed. From this:
 - a. DOT requests information regarding the functionality of the DOT drug and alcohol testing data website, and whether users have specific recommendations regarding possible improvements to the website that would enhance the user’s ability to use the available data.
- (3) *Reach out to potential users to encourage data use.* Actively engaging potential users can provide an opportunity to educate them on how the data can be appropriately used and encourage innovation. From this:
 - a. DOT primarily uses the drug and alcohol testing data to determine the random testing rate for safety-sensitive employees in each industry for the following year, and also sometimes to target educational outreach to the industry. DOT requests

¹³ GAO Report GAO-19-72, titled “Treasury Could Better Align USAspending.gov with Key Practices and Search Requirements.”

information regarding whether users envision other appropriate uses for the drug and alcohol testing data on the DOT website.

CONCLUSION

GAO noted that DOT's drug and alcohol testing website follows eight of 16 key actions that GAO has previously identified for transparently reporting government data. Two others – disclosing known data limitations and reaching out to the public – are addressed through the specific GAO recommendations discussed above. While GAO noted that DOT does not fully follow six other key actions that could improve its drug and alcohol testing website, GAO noted that the potential benefits and costs of following those six actions are unclear because DOT has not reached out to potential users. GAO stated that “With a better understanding of potential needs and uses of the data, DOT would be able to determine whether implementing these actions would provide benefits consistent with any implementation costs.”

DOT will review and evaluate the comments received from potential users that are submitted in response to this notice. If a broader audience for the drug and alcohol testing data is identified, DOT will engage with users to evaluate the benefits and costs of adopting additional key actions for open government data and any other possible improvements to the website.

DOT seeks input on the questions set forth above and welcomes comments from all interested parties.

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